

I N D E X

TERI BOHNSACK

PAGE

Direct Examination by Mr. Carey
Cross-Examination by Mr. Sheehy

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EXCERPT OF PROCEEDINGS

1
2 MR. CAREY: Okay. We call Teri Bohnsack to the
3 stand, please.

4 TERI BOHNSACK,
5 called as a witness and having been first duly sworn, was
6 examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. CAREY:

9 Q. Please state your name.

10 A. Teri Bohnsack.

11 Q. Your occupation?

12 A. Work comp claims examiner for GAB Robbins.

13 Q. How long have you been a claims examiner?

14 A. I have been with GAB Robins since September 16th
15 of '96. I was a claims examiner with Compensation Adjusters
16 for a year and a half before that.

17 Q. All right. We're here today to visit about Lucy
18 Hernandez' work comp claim. When did you first receive
19 notice of it?

20 A. I got the claim on October 8th in my office, and
21 the claim was a medical only claim at that point.

22 Q. When you received the claim, what did you do?

23 A. Since it was a medical only, and she had signed
24 the form that she had returned back to work the next work
25 shift, I sent it to Denver to be handled as a medical only

1 file.

2 Q. What was the nature of the claim? What was the
3 injury involved?

4 A. The injury was for her back and there was a
5 mention of her right heel.

6 Q. Okay. At that time did the file physically leave
7 your office?

8 A. Yes. I did not -- I don't keep anything in my
9 office when I send it to Denver as a medical only.

10 Q. When were you first made aware by anybody that
11 there would be -- that there may be a dispute about the
12 conditions under which she left her job, about whether she
13 may be entitled to benefits?

14 A. The first that I received the file back in my
15 office was December 6th. The activity notes don't show it,
16 but I'm assuming usually before the file just shows up at my
17 office that I get a fax that the file is being transferred
18 back to me.

19 Q. So it was physically out of your office from
20 October up until December?

21 A. December 6th was when it got back to my office.

22 Q. Did you ever receive a phone call from Lucy
23 Hernandez during that time period?

24 A. No.

25 Q. Do you have --

1 A. If she had called my office, the assistant would
2 have told her her claim was being handled in Denver.

3 Q. Do you have an 800 number?

4 A. I do not have an 800 number.

5 THE COURT: Well, how did it get back from Denver?

6 THE WITNESS: They mailed it back either --
7 usually it is sent Second Day Air.

8 THE COURT: But what triggered that?

9 THE WITNESS: The claimant called Denver and spoke
10 to her claims examiner, Cheryl Dekovin (phonetic) on November
11 25th and asked where her checks were at. And at that point
12 Cheryl told her she wasn't -- well, first of all Cheryl
13 clarified that the bills that she had received had been paid,
14 and asked what checks she was referring to.

15 And the claimant indicated that she was off work.
16 Cheryl told her that this was the first she had heard of it
17 and she does not handle lost time claims, she would have to
18 send it back to me.

19 THE COURT: Is that based on an activity report
20 that is in your file?

21 THE WITNESS: It is the November 25th activity
22 note.

23 THE COURT: Okay.

24 BY MR. CAREY:

25 Q. What investigation did you conduct once the file

1 came back in your office in early December?

2 A. Once I got the file on December 6th, I called and
3 left a message with a male at Ms. Hernandez' phone number for
4 her to call me. I then called Scott Miller at American Linen
5 to determine what was going on with the claim and why it was
6 a lost time claim or why she was alleging that it was a lost
7 time claim at that point.

8 Q. Did Ms. Hernandez call you back after you'd left
9 the message at her house?

10 A. She did not.

11 Q. Did you obtain information from Mr. Miller similar
12 to what he has testified here today?

13 A. I did. I obtained information that she had quit
14 her job.

15 Q. Did you continue to try and talk to Ms. Hernandez?

16 A. I called her, on the third phone call on December
17 10th I'd finally gotten through to her. My notes indicate
18 that I had called that day two times before and got the busy
19 signal. I finally did take her recorded statement on
20 December 10th.

21 Q. With regard to the light-duty slips, what did you
22 have in your possession when you would have been able to talk
23 to her on December 10, 1996?

24 A. I would have to check the date stamp. If they had
25 been received in the Denver office, I had them. I'm not sure

1 that I had them at that time.

2 I know Scott Miller provided me some information
3 and the time line that he had after I spoke to him on
4 December 6th.

5 Q. After you visited with her, did you make a
6 determination as to whether she was entitled to benefits,
7 time lost benefits?

8 A. I did.

9 Q. And what was your determination?

10 A. My determination was that she was not temporarily
11 totally disabled as a result of the injury. She was off of
12 work and losing income because she had quit her job.

13 Q. Was there any other information in the file which
14 indicated that she was on light-duty release still or had
15 that been removed?

16 A. We had a medical light-duty release from a doctor
17 for two days only. The light-duty recommendation from the
18 physical therapist is not from a doctor.

19 And at the point that I talked to her, we probably
20 had the -- October 18th was when she first saw Dr. Dorr. And
21 his October 18th work injury disposition slip said light
22 duty. And then the November -- I think it was a November
23 18th follow-up exam did not give any restrictions.

24 So at the time I talked to her she was full duty
25 cleared by Dr. Dorr.

1 THE COURT: Did Dr. Dorr expressly release her to
2 full duty?

3 THE WITNESS: His work injury -- what is it
4 called? The work injury disposition form of November 18th of
5 '96 does not list that she is -- I mean it doesn't list
6 anything. "Follow up in two months and refer TPT."

7 THE COURT: Is there a box there for -- is there a
8 box there that allows him to --

9 THE WITNESS: There is a box that says, "Released
10 without restrictions," that is not marked. There is a box
11 there, "Patient may not work until date or cleared by
12 consulting physician," that is not marked. And there is a
13 box for, "Restricted duty until date or cleared by consulting
14 physician," and that is not marked.

15 THE COURT: So he didn't mark anything. So the
16 previous one that you have was the only one that you had?

17 THE WITNESS: From October, I think it is an
18 October 18th date -- date of exam.

19 BY MR. CAREY:

20 Q. Were there any factual errors with regard to the
21 information you obtained from Ms. Hernandez when you did
22 catch up with her and take her statement?

23 A. Her deposition was not -- the time line that she
24 gave did not match the information that I had received in my
25 investigation with the employer.

1 Q. Let me direct your attention to Exhibit 8,
2 page 10, where Ms. Hernandez described for you the sequence
3 of events.

4 Now, the first sentence refers to going to the ER
5 and being seen by who was Dr. Theade. What does she relate
6 that Dr. Theade indicated?

7 A. She told me in her recorded statement that the
8 doctor had said she wanted her to return to work on
9 light-duty for approximately a week and to let the injury
10 heal.

11 Q. And what actually did Dr. Theade provide in terms
12 of a light-duty work release?

13 A. Dr. Theade had given her a two day light-duty
14 release for September 26th and the 27th.

15 Q. Later Ms. Rodriguez (sic) indicated that with the
16 verbal, she guessed, that it didn't get across to them,
17 American Linen. Was there actually documentation provided to
18 American Linen?

19 A. American Linen is who gave me the off-work slip.
20 So they would have had the actual off-work slip rather than
21 just verbally being told it was light duty.

22 Q. Who does Ms. Rodriguez (sic) say she received her
23 next off-work slip from?

24 A. She then said that she did get in to see Dr. Dorr
25 and he wrote her out a prescription for light duty, which she

1 turned over, and said that she worked light duty for two
2 weeks -- or she said, "After two weeks of continuing with
3 heavy duty and injury to myself, more than what, you know, I
4 felt I needed to, I then went ahead and gave two weeks'
5 notice and then I quit."

6 Q. Had she ever seen Dr. Dorr before she left the
7 employment of American Linen?

8 A. No, she did not see Dr. Dorr until October 18th
9 and she quit on October 10th.

10 Q. So her statement that she ended up leaving two
11 weeks after she saw Dr. Dorr is evidently an error as well?

12 A. It is.

13 Q. After you had an opportunity to examine the file,
14 medical releases, the medical information, and visit directly
15 with Ms. Hernandez, did you make a determination then about
16 whether she was entitled to wage loss benefits?

17 A. I made the determination that she was not entitled
18 to wage loss benefits. I made that determination based on
19 the fact that she was not temporarily totally disabled as a
20 result of the injury. I made it based on the fact that her
21 recorded statement -- she was not consistent with her facts
22 in the recorded statement as they had been found to be. And
23 we didn't have a light-duty work slip past the two days from
24 a doctor at that point.

25 Q. Now, did you hear Ms. Hernandez testify that she

1 put in numerous calls to you?

2 A. I did.

3 Q. Can you tell us whether you worked during the
4 month of January 1997?

5 A. I did not work, I went on maternity leave,
6 December 30th was my last day at work.

7 Q. When did you return to work?

8 A. I took four full weeks off of work and I returned
9 to work for two weeks in the afternoons. And then I came
10 back full-duty after six weeks.

11 Q. Did you request that Ms. Hernandez receive a
12 letter or obtain a letter from Dr. Dorr?

13 A. I don't recall that conversation. I recall that
14 in her recorded statement she had said she would get me the
15 names of witnesses.

16 I would imagine after I took her recorded
17 statement, I might have said if she had medical documentation
18 taking her off of work at that point, to please get it to me.

19 But at that point I didn't have any documentation
20 or any facts that would lead me to believe she was eligible
21 for temporary total disability.

22 Q. Given all the information you had, how was the
23 file handled after that?

24 A. The file was still a med only file, medical only.

25 Q. At some point in February would the office have

1 received medical records or medical requests concerning the
2 ankle?

3 A. The first real mention of the ankle, after all the
4 time of the claim, was the January 20th, which probably would
5 have come in while I was still on maternity leave.

6 The activity notes indicate that I did authorize
7 surgery. At that point the only indication on the ankle was
8 a calcium buildup.

9 Q. Did you personally speak with anyone from Dr.
10 Dorr's -- oh, excuse me, Your Honor.

11 THE COURT: Hold on. What date did you authorize
12 the surgery?

13 THE WITNESS: Well, I'm not sure if it was me or
14 not at that point, because my assistant puts in my initials
15 when she puts in activity dates. But it is a February 5th
16 entry.

17 BY MR. CAREY:

18 Q. Was there any indication in your file that this
19 procedure to remove a calcium deposit was going to affect the
20 claimant's ability to work?

21 A. No.

22 Q. When was the first time that you received any
23 information that raised a question, at least, about whether
24 she was incapable of working?

25 A. I got that letter from Dr. Dorr, his February 28th

1 letter, on April 16th enclosed in a letter from Ms.
2 Hernandez.

3 THE COURT: What about the operative report?

4 THE WITNESS: The operative report would have come
5 in -- the operative report came in on February 28th of '97.
6 And it was approved for payment by someone other than myself.

7 THE COURT: Okay. When was the first -- when did
8 the operative report get there? I take it from what you say
9 the February 28th was a bill?

10 THE WITNESS: Right.

11 THE COURT: Okay.

12 THE WITNESS: And at that point that is the only
13 date stamp I have on these.

14 The hospital surgery bill and the operative report
15 were received in my office on April 2nd. And Dr. -- no, that
16 is an anesthesia bill.

17 THE COURT: Okay. But the operative report was
18 received by you on April 2nd?

19 THE WITNESS: April 2nd.

20 BY MR. CAREY:

21 Q. At what juncture did you -- or when did Dr. Dorr
22 release Ms. Hernandez with regard to the ankle procedure?

23 A. She received a full release as of April 18th.

24 Q. Did you have any discussions with her in that
25 general time frame, end of April, beginning of May, about her

1 case?

2 A. On May 1st she called me and she asked about --
3 well, what she said was that she had been given a full-duty
4 release as of April 24th, which is not correct with the
5 release in the file, and that she couldn't return to work
6 because she had quit her job and so she wanted to know about
7 temporary total disability benefits.

8 Q. And did you understand that request to be a
9 projection into the future?

10 A. The request to me was for temporary total
11 disability benefits now that she had been released and she
12 didn't have a job to go back to.

13 Q. And did you visit with her about that?

14 A. We discussed the fact that she had quit her job,
15 and as such, Workers' Compensation did not pay temporary
16 total disability benefits when you have got a full-duty
17 release and you quit your job.

18 Q. All right. At that juncture --

19 THE COURT: So your position was basically, even
20 though this was related -- the surgery was related to the
21 injury, she wasn't entitled to temporary total disability
22 benefits because she had quit her job before she had the
23 surgery?

24 THE WITNESS: At that point she hadn't asked about
25 the time period for the surgery. And I had still had the

1 file set up as a medical only file. She had never requested
2 or told me that she couldn't work because of the surgery.

3 THE COURT: But you knew that she couldn't from
4 Dr. Dorr's report, didn't you? You had doctor --

5 THE WITNESS: From the operative report on -- I
6 mean the operative report doesn't say whether she can work or
7 not work.

8 THE COURT: Well, on April 16th you have got a
9 copy of Dr. Dorr's letter saying that he would have taken her
10 off work at that point so that she could have surgery.

11 THE WITNESS: When I got his letter on April 16th,
12 his February 28th letter, I looked at that letter as he was
13 going back to, if he had diagnosed the ankle problem earlier,
14 he would have done the surgery earlier.

15 I guess it didn't even -- I mean I didn't look at
16 that for the surgery time. I looked at that letter thinking,
17 "How am I suppose to adjust the claim back to October when
18 the doctors didn't even know," you know, I had to adjust it
19 from the time frame they found out.

20 THE COURT: Okay. But you knew that she had been
21 operated on in February; as of May 1st you knew that she said
22 that she hadn't been released to return to work until
23 May 24th even though --

24 THE WITNESS: A full-duty release.

25 THE COURT: A full-duty release until May 24th.

1 MR. CAREY: April.

2 MR. SHEEHY: April.

3 THE COURT: April 24th. Yet you didn't think at
4 that point you should look into whether or not she might be
5 entitled to benefits?

6 THE WITNESS: At that point I -- I honestly at
7 that point was getting back from maternity leave. No, I did
8 not dig into the file because I still had it set up as a
9 medical only.

10 THE COURT: So because it is set up as a medical
11 you don't think you have to look at that information
12 carefully?

13 THE WITNESS: No, I'm not saying that.

14 THE COURT: Well, it sounds like that is what you
15 are saying.

16 THE WITNESS: At that point in time I had come
17 back from maternity leave, and I was handling my workload on
18 a priority basis. If Lucy had called me on February 5th or
19 February 6th and said, "I'm now off of work," I would have
20 called the doctor.

21 I didn't initial the doctor reports. I did not
22 see the doctor reports. I was having my assistant handle
23 everything that she could that was routine so that I could
24 get to everything that was a priority, to get my desk caught
25 back up from being gone for six weeks.

1 BY MR. CAREY:

2 Q. What was the next activity essentially on the
3 file?

4 A. The next activity on the file was notice that they
5 had filed for mediation.

6 Q. All right.

7 THE COURT: What was the date of that?

8 MR. CAREY: I believe it was June 3rd, Your Honor.

9 THE WITNESS: It was in June.

10 BY MR. CAREY:

11 Q. At that time did you counsel with American Linen
12 and Mr. Sheehy and come to some resolution?

13 A. At that point I agreed, and we had got the check,
14 the TTD check, for the time period after surgery through
15 April 18th when she was full duty released, she had already
16 been paid that, and that was agreed.

17 And we were still in dispute, American Linen did
18 not believe that they had any liability for the October 11th
19 through February 6th, the date of surgery, because they felt
20 she had been accommodated.

21 We came to an understanding that to resolve the
22 issue we would issue a check once we could get a statement
23 that said there was no liability of admission issuing the
24 check, because I don't have the ability to type on the check
25 "Issued with reservation of rights" or -- the checks are

1 computer issued, we don't have the ability to issue -- print
2 anything special on them.

3 THE COURT: Back up just a minute. When was the
4 first check paid?

5 THE WITNESS: The first check for the surgery
6 period? The computer lets me issue a check for 56 days. So
7 the first check, it was two checks, but it was from February
8 14th through April 18th, was input in the computer on the
9 26th and issued on the 27th.

10 THE COURT: Of June?

11 THE WITNESS: Yes.

12 MR. SHEEHY: And, Your Honor, for the benefit of
13 everybody, the photocopy of the check indicates all that
14 information, it is in Exhibit 12, page 4 and 5. There were
15 two checks.

16 THE COURT: Right, I have got them.

17 BY MR. CAREY:

18 Q. And had you essentially reached an understanding
19 with regard to that -- the prior period of time, the October
20 through February time?

21 A. We had.

22 Q. Okay. And is that reflected in Exhibit 4-1 where
23 Mr. Sheehy wrote you a letter?

24 A. He did, he wrote me a letter stating that he had
25 prepared a release.

1 Q. And as I understand your earlier testimony, and
2 the Exhibit 4-2 and 5-1 speak for themselves, basically the
3 documents just said, "We're not admitting liability for any
4 purpose"?

5 A. Steiner Corporation, who, I don't know if they are
6 American Linen's parent company or what they are, did not
7 want to issue a check and find that that held them liable for
8 not accommodating her restrictions. They felt that they had
9 accommodated her and that they did not owe her that money as
10 temporary total disability.

11 THE COURT: Who is the insurer in this matter?

12 THE WITNESS: Steiner Corporation is who I get my
13 authority from.

14 THE COURT: Well, who is --

15 MR. CAREY: National Union Fire.

16 THE COURT: Who is the insurer in this matter?

17 THE WITNESS: I think it is National. My reports
18 go to AIGRM.

19 THE COURT: Is Steiner Corporation self-insured?

20 THE WITNESS: No, I don't think so.

21 THE COURT: There is an insurer; isn't there?

22 THE WITNESS: Well, it was presented at the first
23 of the trial that it was National Union --

24 THE COURT: Union Fire Insurance.

25 THE WITNESS: I'm not -- yeah. I don't have that

1 on my report that tells me about who I contact and who I
2 report to.

3 THE COURT: But it sounds to me like you were
4 taking your marching orders from the employer, not from the
5 insurer?

6 THE WITNESS: From Steiner Corporation in Salt
7 Lake City.

8 THE COURT: They were telling you what they wanted
9 you to do?

10 THE WITNESS: Mm-hmm.

11 THE COURT: And you were listening to them?

12 THE WITNESS: That is who my contact is listed on
13 my -- it is called a Task Report. It just gives me my orders
14 on how I handle the file, who I contact.

15 THE COURT: Well, that is bothersome right off the
16 bat because the insurer has a duty to adjust this claim and
17 exercise its independent determination, and you have got the
18 employer telling you what to do.

19 Doesn't that bother you a little bit?

20 THE WITNESS: I have to go with the report that
21 I'm given. These reports are -- they are national contracts,
22 they are not -- I don't do anything with them. They are --
23 they tell me who my contact is, they tell me what my
24 authority is.

25 THE COURT: Delegating to the employer the

1 authority to call the shots and adjusting a claim is per se
2 unreasonable.

3 MR. CAREY: Your Honor, it happens all the time.

4 THE COURT: I rule right here and now that it is
5 per se unreasonable. And every time I see it and they do it,
6 I'm going to impose a penalty on that basis.

7 I'm telling you that right now.

8 MR. CAREY: I understand that, Your Honor. I
9 think that -- I'd urge you to reconsider that statement,
10 because many times employers have self-retentions which can
11 be hundreds of thousands of dollars on a claim, and that they
12 are always involved with the insurer in terms of directing
13 certain decisions on a claim.

14 And on a \$2,000 issue, I don't think where that --
15 that is unreasonable per se or as a matter of fact.

16 THE WITNESS: This one was \$125,000, anything
17 125,000 and above I'm to contact AIGRM.

18 MR. CAREY: The insurers are -- the insurers can
19 enter into contractual relationships with their insureds with
20 regard to the decision making.

21 THE COURT: But this is a Plan 2 insurer.

22 MR. CAREY: So.

23 THE COURT: This isn't a self-insured, it's a
24 Plan 2 insurer. The insurer is the one that has the duty to
25 adjust the claim.

1 MR. CAREY: Or delegate it in any way which they
2 see fit.

3 THE COURT: But it sounds to me like a veto power
4 has been given to the employer, so there is --

5 MR. CAREY: Well, I don't know that that is the
6 case, Your Honor. I don't think there is any evidence that
7 that is the case. I mean we don't have that case in front of
8 us.

9 THE COURT: Sure sounds like she is reporting to
10 the employer, not to the insurer in this case.

11 MR. SHEEHY: Your Honor, for your benefit we put
12 the whole contract between GAB, Steiner Corporation in the
13 record, it is Exhibit 11, pages 1 and 2.

14 And that is exactly the evidence, that she gets
15 her authority from Steiner, not from NUFICO.

16 THE COURT: So there is no independents here, the
17 employer is the one that is determining whether or not
18 benefits are going to be paid.

19 MR. CAREY: Well, if you're -- Your Honor, there
20 is no evidence as to how that works between Steiner and the
21 carrier. There is no evidence whatsoever.

22 THE COURT: She said she was reporting to
23 Steiner, not to an insurer.

24 MR. CAREY: Well, and what was Steiner's contact
25 with the insurer?

1 THE COURT: You tell me.

2 MR. CAREY: Well, --

3 THE COURT: Sounds to me like --

4 MR. CAREY: Your Honor, usually what will happen
5 is if there is evidence of an issue I'm going to go find out
6 what the evidence is. Here we're getting -- I think this is
7 a red herring, it is a side street.

8 THE COURT: Well, she is saying that she is
9 getting her instructions from Steiner, which is the employer
10 in this case. I mean that is what she testified to.

11 THE WITNESS: I don't know the exact relationship.
12 I assume it is the parent company, but I don't have that
13 information.

14 MR. CAREY: And my comments would stand, I just
15 don't think that this is the issue which we're here for
16 today.

17 BY MR. CAREY:

18 Q. In any event, Mr. Sheehy sent you over a proposed
19 document indicating that the payment was intended to buy
20 peace in the claim only and that the employer and the insurer
21 were admitting no facts or liability?

22 A. He did.

23 Q. And that is Exhibit 4-2. And then at some point
24 you added some language and sent it back to him?

25 A. I did.

1 Q. And that is Exhibit 5-1. And we have heard
2 testimony about it, and it just simply said, "Without regard
3 to discrimination, any other potential employment or
4 discrimination claim," correct?

5 A. Correct.

6 Q. Did you hear back from Mr. Sheehy or Sue of his
7 office or someone?

8 A. Sue called me on -- Sue Brown of Pat Sheehy's
9 office called me on July 16th and said that the wording that
10 we had added was not acceptable. And at that point I asked
11 her to reword it to something that was acceptable to both of
12 us and get it back to me.

13 THE COURT: But you had rejected the first draft
14 that was sent to you, so what was acceptable? You inserted
15 this additional language and you wanted something that was
16 mutually acceptable. So what was going to be mutually
17 acceptable if -- what could they do at that point, other than
18 strike the language out, and you refused to sign that, you
19 refused to accept that?

20 THE WITNESS: They wanted a release -- not even a
21 release, they wanted a statement saying that they had no --
22 they were not liable, there was no admission of liability for
23 that time period. Because at that point my investigation had
24 not held that American Linen in any way was liable for her
25 quitting.

1 We had determined that she had been accommodated,
2 the accommodations were in place, and that her temporary
3 total disability did not result from the injury but from her
4 quitting her job. And by issuing that check, they did not
5 want it to be an admission of liability that they in some way
6 did not accommodate those restrictions.

7 THE COURT: So without putting in that language,
8 how could you have satisfied whoever was asking for the
9 language?

10 THE WITNESS: I'm not an attorney, I don't draw up
11 the language.

12 THE COURT: What did that have to do with the
13 Workers' Compensation claim that you were adjusting?

14 THE WITNESS: We were issuing a check for a time
15 period where they did not feel, and I had not found, that
16 there was any liability.

17 THE COURT: Were you --

18 THE WITNESS: I have no way to issue the check
19 from my computer adding, "Issued under a reservation of
20 rights," or any other wording on the check. I physically
21 cannot do that.

22 THE COURT: Well, were you adjusting -- going to
23 adjust something to do with a wrongful termination or some
24 other cause of action other than a Workers' Compensation
25 claim?

1 THE WITNESS: No.

2 THE COURT: Who asked you to put that language in?

3 THE WITNESS: Steiner Corporation.

4 MR. CAREY: Your Honor, I might propose an answer
5 to your question. And it could simply have said something
6 like, "The employer and insurer herein admit no facts or
7 liability for any purpose." Something innocuous and simple
8 and straightforward.

9 THE COURT: Well, that is not what was put in
10 there and it is not immediately obvious.

11 MR. CAREY: Well, but your question was --

12 THE COURT: It shouldn't have been in there in the
13 first place. It didn't belong in there.

14 MR. CAREY: I was just responding to your
15 question. That is a different issue. And, again, I think
16 that the practice in this state has been -- has been a
17 different practice, but that is what it is.

18 THE COURT: She wasn't adjusting anything other
19 than a Workers' Compensation claim. That was what was at
20 stake here.

21 MR. CAREY: And the language is broad and
22 innocuous.

23 THE COURT: You think it was innocuous. If it was
24 so innocuous it didn't need to be in there at all.

25 Go ahead -- oh, I'm sorry, we need a break. Let's

1 take a break.

2 (Recess.)

3 THE COURT: Okay. Go ahead and pick up.

4 BY MR. CAREY:

5 Q. Teri, were the TTD checks sent to Ms. Hernandez
6 more than 30 days before trial?

7 A. They were.

8 MR. CAREY: Nothing further.

9 THE COURT: Okay. Pat.

10 MR. SHEEHY: Thank you, Judge.

11 CROSS-EXAMINATION

12 BY MR. SHEEHY::

13 Q. Ms. Bohnsack, this is the first time we have met.
14 My name is Pat Sheehy. I'm representing Lucy Hernandez. We
15 have spoken on the phone briefly a couple of times. I think
16 you are more familiar with my assistant Sue maybe.

17 A. With Sue, yes, and Russ.

18 Q. Oh, yeah, Mr. Friendly. It is a Mutt and Jeff
19 routine, as you're soon to find out.

20 You mentioned extensively what the employer had
21 told you back in December when you got the file back around
22 December 6th or something. You had talked to somebody at the
23 Billings plant; is that right?

24 A. I spoke with Scott Miller on December 6th.

25 Q. Now, when I made a request for your entire claims

1 file, I saw no notes of any conversations with the employer
2 and I thought that odd. Did you have some notes that you --

3 A. They are in my activity notes.

4 Q. Okay. Are those those little computerized --

5 A. They are.

6 Q. The thing that say TX or something at the top?

7 A. They say activity notes.

8 Q. Okay. All right. So you kept some notes between
9 what the employer told you and you compared that with what
10 Lucy told you?

11 A. In her recorded statement.

12 Q. Sure. And you felt that that was inconsistent?

13 A. It was inconsistent.

14 Q. Between what the two of them had said?

15 A. Yes.

16 Q. And that is not uncommon in a Workers'
17 Compensation claim, is it?

18 A. It depends. I mean on some claims they are very
19 consistent.

20 Q. And on some they are not?

21 A. Correct.

22 Q. All right. Now, with regard to your relationship
23 with the employer, in your claims file apparently was what
24 has been marked for identification purposes as Exhibit 11,
25 pages 1 and 2. Is that a document that you're familiar with?

1 A. Every account that I have has what is called a
2 task, and it is the instructions for reporting, my settlement
3 authority, and my refunding authority limits.

4 Q. So you know exactly where you stand with regard to
5 your authority on a claim when it is referred to you because
6 that is right on top of the folder?

7 A. For almost all of my clients, yes. It is on the
8 bottom, it is below the E1.

9 Q. And, of course, anytime a question arises, then
10 you refer to that document in order to determine whether you
11 can act on this or someone else has to act on this; is that
12 right?

13 A. This is just for -- I mean it is not an unusual
14 circumstance. It is very basic on what my reporting
15 authority is, what my settlement authority is. It doesn't
16 list out every situation on what I'm going to do on them.

17 Q. Sure. And on the front page of this we see that
18 it mentions the Steiner Corporation as the person you are
19 suppose to contact; would that be correct? Or excuse me, it
20 is on the second page.

21 A. Yes.

22 Q. And the contact then is the Steiner Corporation?

23 A. Up to 10,000 -- or at 10,000. Below 10,000 -- and
24 that is settlement authority.

25 Q. Okay.

1 A. And reporting authority.

2 Q. That is confusing to me. Do you have any
3 authority at all below 10,000?

4 A. I don't have to report to them unless the reserves
5 are set above 10,000.

6 Q. Okay. In this case were the reserves set above
7 10,000?

8 MR. CAREY: Objection, irrelevant.

9 THE COURT: No, not irrelevant at all. She may
10 answer.

11 THE WITNESS: I don't have my history of when the
12 reserves got to what amount. I don't have that with me.

13 BY MR. SHEEHY:

14 Q. So you don't know what the reserves were set at?

15 A. I don't. At that point, in December when I
16 received the file, it was a medical only. So I could safely
17 say, no, the reserves were not above 10,000.

18 Q. In looking at this, and do you have a copy of this
19 that you can refer to?

20 A. I do.

21 Q. Okay. It says, "Report distribution fee per claim
22 and time and expense services, so acknowledgement reports
23 with enclosures all are to go to the plant manager at the
24 involved location"?

25 A. Correct.

1 Q. And in this case that would have been Carl
2 Girardin at American Linen here in Billings?

3 A. Yes.

4 Q. Okay. Anything for \$10,000 and up you have to
5 send them -- send a copy to the plant manager along with a
6 copy to the Steiner Corporation in Salt Lake City; is that
7 right?

8 A. Right, that is reserve levels.

9 Q. And anything that is reserved at above 125,000
10 then goes to AIGRM Claims in Los Angeles, California; is that
11 right?

12 A. Right. And those are reports, my reports on the
13 file.

14 Q. Okay. So is it your testimony then that you had
15 authority to settle this claim?

16 A. I have authority to settle if we're settling the
17 claim. We have at no point come to settlement discussions on
18 the claim.

19 Q. Okay. So you have no authority for settling the
20 temporary total disability issue?

21 A. The temporary total disability issue was not an
22 issue of settlement, it was an issue of whether she was
23 entitled to it at that point. And up and to that point my
24 investigation revealed that she was not entitled to it
25 because she was not temporarily totally disabled from the

1 injury.

2 Q. That is not my question. My question was: Did
3 you have authority to settle the temporary total disability
4 issue at \$2,172?

5 A. The moneywise, yes, but the issue was not a
6 standard settlement issue.

7 Q. Okay. So you felt that under this agreement that
8 we're talking about, Exhibit 11, pages 1 and 2, that you
9 should get authority from, I believe the person's name was
10 Randy; is that right?

11 A. Randy, I think it is Broe (phonetic), was the
12 adjuster at Steiner Corporation who I was referred to.

13 Q. Okay.

14 A. The issue was not an issue of -- it wasn't a
15 standard settlement issue. There was no liability determined
16 for the temporary total disability in question from October
17 through February.

18 Q. Yeah, I know all that --

19 A. That's not reasonable.

20 Q. -- I understand your defenses to it, and I'm not
21 interested in that.

22 What I want to know is, did you or did not have
23 authority to settle the temporary total disability issue?
24 Apparently you did not.

25 A. I did not feel that that was something common in

1 adjusting a claim.

2 Q. And under the agreement that GAB had with Steiner
3 Corporation, you felt that Steiner Corporation should be
4 involved if you were going to settle this \$2,172 issue?

5 A. I felt it was something unusual, yes.

6 Q. So you felt that you would have to get their
7 authority in order to obtain --

8 A. Yes.

9 Q. -- the settlement authority? Yes?

10 A. Yes.

11 Q. And when you went to them for the settlement
12 authority, then it was their idea that you throw in the
13 additional language on the release that I had provided to
14 you, which also included other employment or discrimination
15 claims; isn't that correct?

16 A. Correct.

17 Q. At anytime prior to when you sent this back to me
18 with the additional language, which I believe was, gees,
19 July 8th, is that when you sent it back with the additional
20 language?

21 A. I think I got your -- it from you on July 8th, it
22 was between July 9th and July 16th when I talked to Sue in
23 your office again.

24 Q. At anytime prior to that time had the parties ever
25 discussed any other claims other than the temporary total

1 disability?

2 A. Any other claims in what way?

3 Q. In any way.

4 A. I'm not following your question.

5 Q. Well, we had never -- the claimant had never
6 proposed that we throw in any other claims for this 2,172?

7 A. For settlement?

8 Q. Yes.

9 A. No.

10 Q. So this was a completely new idea that came up on
11 July -- or June 8th when you mailed this back to my office?

12 A. In July?

13 Q. July, I'm sorry. That's correct?

14 A. (Nodded head.)

15 Q. Now, I need to establish some dates for some of
16 these medical reports that were in here. You indicated that
17 you first got the op report on April 2nd?

18 A. The op report from the hospital is date stamped
19 April 2nd.

20 Q. Okay. And that is the one from the hospital?

21 A. Right, that is the bill.

22 Q. We have an office note from Dr. Dorr that
23 indicates that he sent GAB-2 the office note -- or the
24 operative report on 2-26-97.

25 What I'm looking at here is Exhibit 2, page 7. Is

1 it possible that you threw that copy away and kept the one
2 from the hospital?

3 A. No. All I'm going by is my date stamps on the
4 bills.

5 Q. Okay. And so -- oh, the way you identified the
6 date for receipt of the operative report was from the bill
7 that you got from the hospital on April 2nd?

8 A. Correct. I mean at that point I was not aware my
9 assistant wasn't date stamping the medical reports also.
10 That has been corrected. So I'm going by the date stamps on
11 the bills.

12 Q. Okay. Well, when you get a bill from -- either
13 from a medical provider, you can't really authorize payment
14 of that bill until you have seen the report that is behind
15 the bill; is that correct?

16 A. Correct. If we receive a bill without the notes,
17 we send the bill back.

18 Q. And isn't it customary for the doctors' offices to
19 send with their bills the notes that are behind those bills?

20 A. They are suppose to. Some consistently do not.

21 Q. In the case of Orthopedic Associates they always
22 do, don't they?

23 A. I have no reason to doubt that they do or don't.

24 Q. That they do?

25 A. Right, I don't have any reason to question that.

1 The only one in here that I have got for sure that was sent
2 back was the anesthetic bill.

3 Q. Now, I'm handing you a bill that came from
4 Dr. Dorr's office for the surgery.

5 A. Yes.

6 Q. And what is the date that is indicated on there?

7 A. That is date stamped February 28th of '97.

8 Q. And his office note said that he sent that on
9 February 26th?

10 A. (Nodded head.)

11 Q. The operative report. Wouldn't he customarily
12 send the operative report with his operative bill?

13 A. I assume so, yes.

14 Q. So wouldn't it be more natural to assume that your
15 first receipt of the operative report would have been on
16 February 28th when you got the operative bill from Dr. Dorr?

17 A. Yes. I just didn't see this when Judge McCarter
18 first asked me that question.

19 Q. Sure, I understand. Here is another med bill that
20 I found in there. I will have you look at that. Is that a
21 med bill from Pharmacy One for crutch rentals?

22 A. Yes. It was received February 11th, and it was
23 approved for payment by my supervisor because I must have
24 been on maternity leave at that point.

25 Q. Okay. So it was approved for payment on

1 February 27th?

2 A. Whatever day her stamp is on there, Sandy Diney
3 (phonetic).

4 THE COURT: Which one was approved for payment?

5 MR. SHEEHY: Crutch rental, received in their
6 office on February 11th, approved for payment on February
7 27th.

8 BY MR. SHEEHY:

9 Q. When you receive a crutch rental pharmacy bill,
10 doesn't it trigger something in your mind that maybe this
11 person is not able to work at this point?

12 A. I did not receive that bill. As I said, I did not
13 approve it, I did not approve the -- Dr. Dorr's surgery bill.
14 Those are my initials, but that is not my handwriting.

15 Q. Okay. And in your customary way you do business,
16 wouldn't that trigger in your mind that maybe we should make
17 an inquiry and find out what is going on here, if this person
18 is able to work at this point?

19 A. Yes.

20 Q. Okay. I just want to confirm some of the date
21 stamps that were on some of the medical reports in the file.
22 Here is one that covers three different office notes from
23 Dr. Dorr, and I can't read this date stamp. Do you have that
24 one in your file?

25 MR. SHEEHY: For the Court's record it is

1 Exhibit 2, page 7.

2 THE COURT: That is where I'm on.

3 THE WITNESS: What is the last date on that?

4 BY MR. SHEEHY:

5 Q. I'm sorry, it runs from 2-6-97 through 3-14-97.

6 A. March 31st.

7 Q. March 14th.

8 A. March 31st is my date stamp.

9 Q. Oh, okay. And in those office notes on that page
10 that were received on March 31st, there is discussion at
11 various levels here, on 2-11 he's talking about that she
12 requires a 3-D walker to get around; is that right?

13 A. The notes of February 11th do say that.

14 Q. Okay. And he is indicating again on 2-21 that she
15 needs the 3-D walker when out and about. Would that be
16 right?

17 A. That's right.

18 Q. And when you see these kinds of notes, doesn't it
19 usually trigger in your mind an inquiry as to whether or not
20 this person is able to work?

21 A. A 3-D walker is an ankle brace. And when it says
22 that she is up and out and about, it triggers to me that she
23 is at least capable of some form of activity.

24 Q. Let's look at Exhibit 2, page 2, which is Dr.
25 Dorr's office notes. The first one starting 4-18 of '97.

1 There is only one other one on it here, it is 6-25 of '97.

2 A. Can I see your --

3 Q. Yeah, I'm sorry. I should have shown it to you.

4 A. Okay. I haven't found it yet, but...

5 Q. Oh, let me just leave it for you.

6 A. Okay.

7 Q. Have you found it?

8 A. Oh, I wasn't looking. I thought you were going to
9 leave that here for your next question.

10 Q. Well, I'm interested in the date stamp, I can't
11 read it.

12 A. Oh, okay.

13 Q. I need to know when you received it.

14 A. Okay. Does anyone have an eraser or something
15 that I can -- I can't find it just flipping through the file
16 without going through every --

17 THE COURT: You're in luck.

18 THE WITNESS: Thank you. It just has the two
19 dates on it? I have got one with three dates on it.

20 BY MR. SHEEHY:

21 Q. This one just has two on it that were produced as
22 part of your claims file. So the one with three came in
23 after I requested the claim file.

24 A. July 14th of '97.

25 Q. Okay. And that one has an additional office note

1 of 6-25 of '97 on it, doesn't it?

2 A. Yes.

3 Q. The one -- the office note of 4-18-97 indicates
4 that it was mailed to GAB-2 on 4-24-97. Do you have any
5 reason to dispute that?

6 A. I do not.

7 Q. And, of course, in that office note, Dr. Dorr
8 indicates that she is now ready to return to work, doesn't
9 he?

10 A. Yes.

11 Q. And wouldn't that trigger in your mind the
12 assumption that up to this point, from the surgery forward,
13 she hadn't been able to work?

14 A. That is a full-duty release, it doesn't indicate
15 when she was able to go back to light duty.

16 THE COURT: Well, where does it say it's a
17 full-duty release?

18 THE WITNESS: On the 4-18 work injury disposition
19 form, there is a -- well, they are yellow in my file. The
20 4-18 one, "Released with no restrictions."

21 BY MR. SHEEHY:

22 Q. So you don't think that it is your obligation when
23 you get a report like that to write the doctor and say,
24 "Before this time, were you talking that she was reduced to
25 light duty even though there is nothing in your operative or

1 in your reports, or were you talking about full-duty, not
2 able to work"?

3 A. If I had been reviewing all the medical bills up
4 until that point, yes.

5 THE COURT: Hold on. There is a work injury
6 disposition form dated 3-14-97.

7 MR. SHEEHY: That's correct.

8 THE COURT: That was prior to the 4-24 one. This
9 apparently is taken from your file, it says "Patient may not
10 work until cleared by the consulting physician." Was that in
11 your file?

12 THE WITNESS: Yes.

13 BY MR. SHEEHY:

14 Q. When did you receive that?

15 A. I don't have a date stamp on it.

16 THE COURT: Does it proceed in your file the
17 disposition for 4-18?

18 THE WITNESS: It is in my file before that.

19 THE COURT: So do you keep your file in
20 chronological order as received?

21 THE WITNESS: I have a drop file and when my
22 assistant goes through and files, she takes whatever is in
23 the drop file and puts it into this file. I don't know if
24 she puts them in chronological order or if she just stamps
25 them and puts them into the file.

1 THE COURT: And there is no date stamp on that
2 because your assistant wasn't stamping them at the time?

3 THE WITNESS: She is now.

4 THE COURT: Well, I'm going to draw an inference
5 that it was received before the 4-18 one?

6 THE WITNESS: Which makes sense.

7 THE COURT: Which means that that should have been
8 available to you when you did this claim.

9 MR. SHEEHY: I don't have anything further, Your
10 Honor.

11 THE COURT: Steve.

12 MR. CAREY: Nothing further. That is all we have.

13 THE COURT: Okay. Well, I'm going to bench rule.
14 I'm going to award the penalty on the whole thing. If I can
15 award attorney fees, I will award attorney fees. The problem
16 I'm looking at attorney fees is the statute. And I have
17 got --

18 MR. SHEEHY: Can we brief that, Your Honor. I
19 didn't do a very good job in my proposed findings, and I'm
20 sure Steve would like to respond to anything that I might
21 have to say.

22 THE COURT: Okay. Well, I'll give you a week to
23 brief it, and then I'll give Steve a week to reply.

24 Sometimes as I read the statutes they get
25 construed differently than when I read them. Reading them on

1 their face it doesn't appear that I can impose the attorney
2 fee, but I know the Supreme Court has done some stuff with
3 that.

4 I want to talk about the unreasonableness of the
5 insurer. I think it is likely that this case would have been
6 buried but for attorney involvement, nothing would have ever
7 happened, she still would be without benefits.

8 I don't think classifying this as a med only
9 excuses or changes the duty to investigate. I think there is
10 ample material in here to indicate in, at least by mid-April,
11 if not at the latest May 1, that there was a lost time due to
12 this injury.

13 While maternity leave and workload may be an
14 excuse for Ms. Bohnsack and make her contact personally less
15 culpable, is no excuse for the insurer or the adjuster. The
16 adjuster -- the insurer and the adjuster have a duty to
17 adequately staff and assure that an adequate, timely and
18 diligent investigation was conducted and it wasn't.

19 As far as the insurer's responsibility in
20 delegating that to the employer, that is patently
21 unreasonable. I so hold as a matter of law.

22 And I refer counsel to 39-71-2203 which concerns
23 Plan Number Twos. It says that "The insurance agreement
24 shall be construed to be a direct promise by the insured to
25 the person entitled to compensation.

1 Every Plan Number Two must contain a clause to the
2 effect that the insurer shall be directly and primarily
3 liable to and will pay directly to the employee, or in cases
4 of death, to his insured beneficiaries or major or minor
5 dependents, the compensation, if any, for which the employer
6 is liable. The duty is the insurer's here and that cannot be
7 delegated to the employer." And it was in this case, and
8 that was unreasonable. And that will be my ruling in the
9 case.

10 I'll take the briefs on the attorney fees and
11 determine whether or not I should award them.

12 MR. CAREY: Thank you.

13 MR. SHEEHY: Thank you, Judge.

14 (Portion ordered was concluded.)

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